

CLARKSON LAW FIRM, P.C.

Ryan J. Clarkson (SBN 257074)

rclarkson@clarksonlawfirm.com

Bahar Sodaify (SBN 289730)

bsodaify@clarksonlawfirm.com

Alan Gudino (SBN 326738)

agudino@clarksonlawfirm.com

Ryan D. Ardi (SBN 348738)

rardi@clarksonlawfirm.com

22525 Pacific Coast Highway

Malibu, CA 90265

Tel.: (213) 788-4050

Fax: (213) 788-4070

Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

PHILLIP WHITE, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

T.W. GARNER FOOD CO., a North
Carolina corporation,

Defendant.

Case No. 2:22-cv-06503-MEMF (SKx)

CLASS ACTION

Assigned to Hon. Maame Ewusi-Mensah
Frimpong

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS**

Hrg. Date: December 21, 2023

Hrg. Time: 10:00 a.m.

Courtroom: 8B

Case Filed: September 12, 2022

Phillip White ("Plaintiff"), individually and on behalf of all others similarly
situated, by and through his counsel, hereby submits the following memorandum of
points and authorities in support of Plaintiff's Motion to Dismiss.

TABLE OF CONTENTS

Page No.

I. INTRODUCTION 1

II. PROCEDURAL BACKGROUND 1

III. DISMISSAL IS APPROPRIATE UNDER RULE 41(a)..... 2

 A. Dismissal Should Be Allowed Because Defendant Cannot Demonstrate
 It Will Suffer Plain Legal Prejudice..... 3

 B. Dismissal Should Be Without Prejudice..... 5

 C. No Terms and Conditions Should be Imposed 7

IV. PLAINTIFF SEEKS VOLUNTARY DISMISSAL TO STOP
DEFENDANT’S HARASSMENT 8

V. CONCLUSION 14

TABLE OF AUTHORITIES

Page No.

Am. Pipe & Constr. Co. v. Utah,
414 U.S. 538 (1988)..... 13

Arteris S.A.S. v. Sonics, Inc.,
No. C12-0434 SBA,
2013 WL 3052903 (N.D. Cal. June 17, 2013)..... 5

Bader v. Elecs. for Imaging, Inc.,
195 F.R.D. 659 (N.D. Cal. 2000) 3

Burnette v. Godshall,
828 F. Supp. 1439 (N.D. Cal. 1993) 5

Callwave Commc'ns, LLC v. Wavemarket, Inc.,
No. C 14-80112 JSW (LB),
2014 WL 2918218 (N.D. Cal. June 26, 2014)..... 10

Canandaigua Wine Co. v. Moldauer,
No. 1:02-CV-06599-OWW-DLB,
2009 WL 1575176 (E.D. Cal. June 3, 2009)..... 7

Chang v. Pomeroy,
No. CIV S-08-0657,
2011 WL 618192 (E.D. Cal. Feb. 10, 2011) 3

Clevenger v. Welch Foods Inc.,
342 F.R.D. 446 (C.D. Cal. 2022)..... 12

Clevenger v. Welch Foods Inc.,
No. SACV 20-01859-CJC (JDEx),
2023 U.S. Dist. LEXIS 96684 (C.D. Cal. May 30, 2023)..... 7

Corbett v. Pharmacare U.S., Inc.,
No. 21CV137-GPC(AGS),
2022 WL 2835847 (S.D. Cal. July 20, 2022)..... 5

DeNicolo v. Hertz Corp.,
2021 WL 1176534 (N.D. Cal. Mar. 29, 2021) 12

Drimmer v. WD-40 Co.,
343 Fed. App'x 219 (9th Cir. 2009)..... 11

Hana Fin., Inc. v. Most Off. 7, Inc.,
No. CV 15-372-MWF(JEMX),
2015 WL 13357671 (C.D. Cal. July 9, 2015) 6, 7

Hepp v. Conoco, Inc.,
97 F. App'x 124 (9th Cir. 2004)..... 3

Houston v. Cintas Corp.,
No. C 05-3145 JSW,
2009 WL 921627 (N.D. Cal. Apr. 3, 2009)..... 13

1	<i>Kesler v. Ikea U.S., Inc.</i> ,	
2	2008 WL 413268 (C.D. Cal. Feb. 4, 2008)	12
3	<i>Melgar v. Zicam LLC</i> ,	
4	No. 2:14-cv-00160-MCE-AC,	
	2016 WL 1267870 (N.D. Cal. Mar. 31, 2016)	12
5	<i>Murphy v. Peter Spennato DDS Inc.</i> ,	
6	No. SACV1300015JVSJPRX,	
	2013 WL 12130010 (C.D. Cal. Dec. 30, 2013).....	3
7	<i>Nidec Corp. v. Victor Co. of Japan</i> ,	
	249 F.R.D. 575 (N.D. Cal. 2007)	10
8	<i>Opperman v. Path, Inc.</i> ,	
9	No. 13-cv-00453-JST,	
	2015 U.S. Dist. LEXIS 171564 (N.D. Cal. Dec. 22, 2015)	3, 7
10	<i>Pelletier v. United States</i> ,	
11	No. 20-cv-1805-GPC-DEB,	
	2021 U.S. Dist. LEXIS 128486 (S.D. Cal. July 8, 2021).....	7
12	<i>Revolution Eyewear, Inc. v. Aspex Eyewear Inc.</i> ,	
13	No. CV 03-5965 PSG (MANx),	
	2007 U.S. Dist. LEXIS 98687 (C.D. Cal. Sep. 26, 2007)	5
14	<i>Ries v. Arizona Beverages USA LLC</i> ,	
15	287 F.R.D. 523 (N.D. Cal. 2012)	12
16	<i>Sacchi v. Levy</i> ,	
17	No. CV1408005MMMFFMX,	
	2015 WL 12765637 (C.D. Cal. Oct. 30, 2015)	4
18	<i>Self v. Equinox Holdings, Inc.</i> ,	
19	No. CV 14-04241 MMM (AJWx),	
	2015 U.S. Dist. LEXIS 191606 (C.D. Cal. Jan. 5, 2015).....	2, 7
20	<i>Sherman v. Yahoo! Inc.</i> ,	
21	No. 13CV0041-GPC-WVG,	
	2015 WL 473270 (S.D. Cal. Feb. 5, 2015).....	6, 7
22	<i>Smith v. Lenches</i> ,	
	263 F.3d 972 (9th Cir. 2001)	3
23	<i>Soto v. Castlerock Farming and Transport, Inc.</i> ,	
24	282 F.R.D. 492 (E.D. Cal. 2012).....	10
25	<i>Stubbs v. Teleflora, LLC</i> ,	
26	No. CV13-3279 ODW (CWx),	
	2014 U.S. Dist. LEXIS 81658 (C.D. Cal. June 16, 2014).....	4
27	<i>Westlands Water Dist. v. United States</i> ,	
28	100 F.3d 94 (9th Cir. 1996)	3

1 *White v. The Kroger Co., et al.*,
 No. 3:21-cv-08004-RS (N.D. Cal.) 8, 9, 11

2 *Williams v. Peralta Cmty. Coll. Dist.*,
 227 F.R.D. 538 (N.D. Cal. 2005) 3, 4

3

4 *World Trading 23 v. EDO Trading, Inc.*,
 No. 2:12-CV-10886ODWP(JWX),
 2013 WL 12134187 (C.D. Cal. Nov. 14, 2013)..... 4

5

6 **Federal Statutes**

7 Fed. R. Civ. P. 26(f) 1, 6, 7

8 Fed. R. Civ. P. 41(a)(2) *passim*

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

I. INTRODUCTION

Plaintiff respectfully moves to voluntarily dismiss this action without prejudice or conditions, pursuant to Federal Rule of Civil Procedure 41(a)(2). This relief is proper for several reasons. First, there would be no plain legal prejudice to Defendant T.W. Garner Food Co., (“Defendant”), as the requested relief would dispose of the case entirely, resolving all issues and claims and leaving no lingering issues to address. Second, at this early stage of the litigation, there has been no meaningful trial preparation, but only a pleadings challenge, some written discovery, and subpoenas served just two weeks ago by Defendant. Still, Plaintiff has litigated the case diligently by propounding written discovery immediately after the Court denied Defendant’s motion to dismiss in its entirety, and almost two months ahead of the parties’ Rule 26(f) conference. This diligence supports the requested relief. Third, and critically, Plaintiff has been compelled to seek dismissal due to the harassment he and his friends have experienced in connection with Defendant’s discovery efforts, including unfounded and personally defamatory accusations inexplicably lodged in an *initial case management statement* by Defendant with zero evidentiary basis. Finally, no basis exists to impose conditions on dismissal, as there have been no merits motions, and the Court has yet to enter a case schedule. Accordingly, Plaintiff’s request for voluntary dismissal under Rule 41(a)(2) should be granted unconditionally and without prejudice.

II. PROCEDURAL BACKGROUND

On September 12, 2022, Plaintiff filed this false advertising class action against Defendant for deceptively creating the false impression that its Texas Pete hot sauce products (the “Products”¹) are made in Texas when the reality is they are neither made in Texas nor with ingredients sourced there, but instead are made entirely in a factory in North Carolina. (Dkt. 1 ¶ 4). Plaintiff seeks relief under California consumer

¹ The three Products at issue include: (1) Texas Pete Original Hot Sauce, (2) Texas Pete Hotter Hot Sauce, and (3) Texas Pete Roasted Garlic Hot Sauce. (Dkt. 1 ¶ 15).

1 protection statutes and common law on behalf of a nationwide class and a subclass of
2 California consumers. (*Id.*)

3 On November 10, 2022, Defendant filed a motion to dismiss the operative
4 complaint. (Dkt. 12). The parties fully briefed the motion on April 6, 2023 (Dkt. 20),
5 and the Court denied the motion in its entirety on July 31, 2023 (Dkt. 28). Three days
6 later, Plaintiff propounded written discovery on Defendant, and then granted an
7 extension for Defendant to provide its responses by October 5, 2023. (Declaration of
8 Bahar Sodaify, “Sodaify Decl.” ¶ 2). On August 14, 2023, Defendant filed its answer
9 to the operative complaint. (Dkt. 29). That same day, the Court set the case
10 management conference for October 5, 2023. (Dkt. 32). On September 12, 2023,
11 Defendant served written discovery on Plaintiff, and it issued deposition and
12 document subpoenas on two non-parties on September 15, 2023. (Sodaify Decl. ¶ 2).
13 On September 18, 2023, Plaintiff addressed the subpoenas issued on the non-parties
14 in an email to Defendant and requested a meet and confer call pursuant to Local Rule
15 7-3 with Defendant regarding Plaintiff’s prospective motions, including this motion
16 to dismiss. (*Id.*) The next day, Plaintiff and Defendant met and conferred pursuant to
17 L.R. 7-3 to discuss in part Plaintiff’s motion to dismiss. (*Id.*) Subsequently, Plaintiff
18 formally objected via letter to Defendant’s third-party deposition and document
19 subpoenas. (*Id.*) On September 21, 2023, the parties filed their joint case management
20 statement. (*Id.*; Dkt. 40).

21 **III. DISMISSAL IS APPROPRIATE UNDER RULE 41(a)**

22 According to Federal Rule of Civil Procedure 41(a), after an opposing party has
23 served an answer or motion for summary judgment, “an action may be dismissed at
24 the plaintiff’s request only by court order, on terms that the court considers proper.”
25 Fed. R. Civ. P. 41(a)(2). In resolving a motion for voluntary dismissal under Rule
26 41(a)(2), courts make three determinations: (1) whether to allow dismissal; (2)
27 whether the dismissal should be with or without prejudice; and (3) what terms and
28 conditions, if any, should be imposed. *See id.*; *Self v. Equinox Holdings, Inc.*, No. CV

1 14-04241 MMM (AJWx), 2015 U.S. Dist. LEXIS 191606, at *11 (C.D. Cal. Jan. 5,
 2 2015); *Williams v. Peralta Cmty. Coll. Dist.*, 227 F.R.D. 538, 539 (N.D. Cal. 2005).
 3 Dismissal under Rule 41(a)(2) is to be liberally granted. *Murphy v. Peter Spennato*
 4 *DDS Inc.*, No. SACV1300015JVSJPRX, 2013 WL 12130010, at *1 (C.D. Cal. Dec.
 5 30, 2013).

6 **A. Dismissal Should Be Allowed Because Defendant Cannot**
 7 **Demonstrate It Will Suffer Plain Legal Prejudice**

8 “A district court should grant a motion for voluntary dismissal under Rule
 9 41(a)(2) unless a defendant can show that it will suffer some plain legal prejudice as
 10 a result.” *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001); *Hepp v. Conoco, Inc.*,
 11 97 F. App’x 124, 125 (9th Cir. 2004) (“A motion for voluntary dismissal pursuant to
 12 Federal Rule of Civil Procedure 41(a)(2) should be granted unless a defendant can
 13 show that it will suffer some plain legal prejudice as a result of the dismissal.”); *Chang*
 14 *v. Pomeroy*, No. CIV S-08-0657, 2011 WL 618192, at *1 (E.D. Cal. Feb. 10, 2011)
 15 (same); *Bader v. Elecs. for Imaging, Inc.*, 195 F.R.D. 659, 662 (N.D. Cal. 2000)
 16 (same). The burden is on Defendant to establish legal prejudice. *Murphy*, 2013 WL
 17 12130010, at *1 (“Defendants have not identified the type of legal prejudice that
 18 precludes Plaintiffs’ voluntary dismissal of their claims”).

19 Dismissal here would not result in plain legal prejudice to Defendant. Typically,
 20 plain legal prejudice includes “the loss of a federal forum, or the right to a jury trial,
 21 or a statute-of-limitations defense.” *Westlands Water Dist.*, 100 F.3d 94, 97 (9th Cir.
 22 1996). None of those apply. This circuit has also found legal prejudice when the
 23 dismissal of a party would render remaining parties unable to conduct sufficient
 24 discovery to defend themselves. *Id.* But that does not apply here either because
 25 Plaintiff’s request for voluntary dismissal will dispose of the entire case. *Cf.*
 26 *Opperman v. Path, Inc.*, No. 13-cv-00453-JST, 2015 U.S. Dist. LEXIS 171564, at
 27 *13 (N.D. Cal. Dec. 22, 2015) (granting dismissal without prejudice on condition that
 28

1 plaintiff answer discovery as the case would continue with remaining parties and
2 claims).

3 Even if Plaintiff were to refile the case, which he will *not* for the reasons
4 discussed below, that would not amount to legal prejudice to Defendant; nor would
5 having to defend the same claims in the future. Instead, as courts in this District have
6 explained, “[l]egal prejudice ‘does not result merely because a defendant will be
7 inconvenienced by potentially having to defend the action in another forum or
8 because the dispute will remain unsolved.’” *Stubbs v. Teleflora, LLC*, No. CV13-3279
9 ODW (CWx), 2014 U.S. Dist. LEXIS 81658, at *3 (C.D. Cal. June 16, 2014) (internal
10 quotations omitted); *see Sacchi v. Levy*, No. CV1408005MMMFFMX, 2015 WL
11 12765637, at *3 (C.D. Cal. Oct. 30, 2015) (granting dismissal without prejudice,
12 indicating that, among other reasons, “the prospect of a subsequent suit on the same
13 facts is insufficient to establish legal prejudice.”) (internal quotation and citation
14 omitted).

15 Furthermore, this case is only 12 months old, and discovery is at its inception.
16 Plaintiff propounded a first set of discovery on August 3, 2023, which based on an
17 agreed upon extension, Defendant is expected to respond to by October 5, 2023.
18 (Sodaify Decl. ¶ 2). And just recently, on September 12, 2023, Defendant propounded
19 its first set of written discovery on Plaintiff. (*Id.*) Defendant then served document
20 and deposition subpoenas on non-party witnesses on September 15, 2023. (*Id.*)
21 Discovery is therefore at its preliminary stage, and in the context of a complex class
22 action such as this one, Defendant cannot say it has yet engaged in an exhaustive or
23 costly discovery effort that could be jeopardized by a dismissal. *See World Trading*
24 *23 v. EDO Trading, Inc.*, No. 2:12-CV-10886ODWP(JWX), 2013 WL 12134187, at
25 *4 (C.D. Cal. Nov. 14, 2013) (dismissing without prejudice even though defendants
26 incurred attorneys’ fees, as no depositions had been taken, and discovery requests had
27 merely been exchanged, and no responses provided); *Williams v. Peralta Cmty. Coll.*
28 *Dist.*, 227 F.R.D. 538, 540 (N.D. Cal. 2005) (granting dismissal under Rule 41(a)(2)

1 without prejudice, despite the case having been ongoing for two years, because “the
2 suit has not progressed” far enough to warrant prejudice when, for example, plaintiff
3 sought “dismissal even before the initial disclosures are due.”).

4 **B. Dismissal Should Be Without Prejudice**

5 Federal Rule of Civil Procedure 41(a)(2) provides that, unless otherwise
6 specified in the court’s order, the dismissal of a case is without prejudice. Fed. R. Civ.
7 P. 41(a)(2). Factors relevant in determining whether the dismissal should be with or
8 without prejudice include: “(1) the defendant’s effort and expense involved in
9 preparing for trial, (2) excessive delay and lack of diligence on the part of the plaintiff
10 in prosecuting the action, [and] (3) insufficient explanation of the need to take a
11 dismissal.” *Burnette v. Godshall*, 828 F. Supp. 1439, 1443-44 (N.D. Cal. 1993).

12 All the factors favor dismissal without prejudice here. To begin, Defendant has
13 not incurred significant expense or efforts in preparing for trial as the case is in its
14 early stages. To date, the parties have only fully briefed Defendant’s unsuccessful
15 motion to dismiss (Dkt. 28), they have exchanged written discovery requests (though
16 no responses have been provided), and they have submitted a joint case management
17 statement (Dkt. 40; Sodaify Decl. ¶ 2). These are precisely the types of preliminary,
18 non-trial preparation activities that courts conclude weigh in favor of voluntary
19 dismissal *without* prejudice. *See, e.g., Corbett v. Pharmacare U.S., Inc.*, No.
20 21CV137-GPC(AGS), 2022 WL 2835847, at *5 (S.D. Cal. July 20, 2022) (dismissing
21 case *without* prejudice where pleadings challenges had occurred, because such
22 challenges “do not concern Defendant’s efforts and expense in preparing for trial.”);
23 *Revolution Eyewear, Inc. v. Aspex Eyewear, Inc.*, No. CV 03-5965 PSG (MANx),
24 2007 U.S. Dist. LEXIS 98687, at *8 (C.D. Cal. Sep. 26, 2007) (granting a dismissal
25 *without* prejudice under Rule 41(a) even when defendants argued they spent resources
26 preparing for trial after filing a motion for summary judgment); *see also Arteris S.A.S.*
27 *v. Sonics, Inc.*, No. C12-0434 SBA, 2013 WL 3052903, at *4 (N.D. Cal. June 17,
28 2013) (holding dismissal *without* prejudice appropriate even though defendants

1 served and responded to numerous discovery requests, retained experts, traveled to
2 Europe to depose witnesses, and spent hundreds of dollars preparing for trial, because
3 there “ha[d] not been significant progress in the case”).

4 As to the second factor, there has been no excessive delay or lack of diligence
5 on Plaintiff’s part in prosecuting this case. Instead, the opposite is true: Plaintiff
6 served Defendant with written discovery only three days after the Court entered its
7 order denying Defendant’s motion to dismiss and almost two months before the
8 parties held their Rule 26(f) conference. (Sodaify Decl. ¶ 2); *see Hana Fin., Inc. v.*
9 *Most Off. 7, Inc.*, No. CV 15-372-MWF(JEMX), 2015 WL 13357671, at *3 (C.D.
10 Cal. July 9, 2015) (dismissing without prejudice where defendant has invested only
11 limited effort and expense in litigating this case, which is still within its first year,
12 plaintiff did not delay in prosecuting the action, and plaintiff provided a sound
13 explanation for dismissal).

14 Finally, Plaintiff has good reason to justify his desire to dismiss this case
15 voluntarily without prejudice. As explained in greater detail below, Plaintiff has been
16 subjected to harassment in this litigation, stemming from Defendant’s speculative
17 claim that Plaintiff has engaged in an illegal capper arrangement with his counsel.
18 (Declaration of Plaintiff Phillip White, “White Decl.” ¶¶ 4-8). This unsupported
19 contention has led Defendant to engage in harassing and dangerous behavior toward
20 an employee of Clarkson Law Firm as well as Plaintiff’s friends who have no
21 connection to this case. Defendant even lodged this serious charge publicly in an
22 *initial case management statement*, in an effort to defame and embarrass Plaintiff,
23 without any evidence. (Dkt. 40 at 5:19–6:9). Plaintiff’s basis is thus not only adequate
24 but completely understandable. (White Decl. ¶¶ 4-8). And it serves as a valid and
25 sufficient basis to find dismissal without prejudice appropriate, especially when
26 courts have found sufficient bases for dismissal in varied, yet far less egregious
27 situations. *See, e.g., Sherman v. Yahoo! Inc.*, No. 13CV0041-GPC-WVG, 2015 WL
28 473270, at *5 (S.D. Cal. Feb. 5, 2015) (granting dismissal without prejudice even

1 where plaintiff only offered only a “vague explanation for the dismissal—‘personal
2 circumstances and time constraints.’”); *Canandaigua Wine Co. v. Moldauer*, No.
3 1:02-CV-06599-OWW-DLB, 2009 WL 1575176, at *5 (E.D. Cal. June 3, 2009)
4 (finding plaintiff’s explanation adequate where he was not interested in pursuing
5 relief that would not likely lead to a financially desirable outcome); *Self*, 2015 U.S.
6 Dist. LEXIS 191606, at *13 (finding the “explanation for seeking dismissal [sufficient
7 where plaintiff] wishes to proceed against defendants and Gannon in the same
8 action”); *Hana Fin., Inc.*, 2015 WL 13357671, at *3 (dismissing without prejudice
9 where plaintiff provided a sound explanation for dismissal: “namely, that the
10 Defendant company does not appear to be in business.”).

11 **C. No Terms and Conditions Should be Imposed**

12 Under Rule 41(a), a court may dismiss a case on terms it considers proper. Fed.
13 R. Civ. P. 41(a)(2). However, “[a] court may, but need not, condition a Rule 41(a)(2)
14 dismissal on a plaintiff’s deposition or production of discovery.” *Sherman*, 2015 WL
15 473270, at *7.

16 No terms or conditions should be imposed here. The discovery phase is in its
17 infancy, no discovery or case deadlines have been set, and no responses to discovery
18 would provide value to Defendant—especially when Plaintiff seeks to dismiss the
19 case in its entirety. *See Pelletier v. United States*, No. 20-cv-1805-GPC-DEB, 2021
20 U.S. Dist. LEXIS 128486, at *7 (S.D. Cal. July 8, 2021) (granting a dismissal without
21 prejudice and without conditions after a motion to dismiss was filed, because the case
22 was “in its early stages”); *cf. Opperman*, 2015 U.S. Dist. LEXIS 171564, at *13
23 (granting dismissal on condition that plaintiff answer discovery already propounded
24 as the case would continue with remaining parties and claims).

25 Further, although Defendant indicated in its Rule 26(f) report that it anticipated
26 filing a motion to compel two non-parties witnesses to comply with its deposition and
27 document subpoenas (Dkt. 40 at 12:12-16), an anticipatory discovery motion is
28 insufficient to warrant the imposition of any conditions on the dismissal. *See*

Clevenger v. Welch Foods Inc., No. SACV 20-01859-CJC (JDEx), 2023 U.S. Dist. LEXIS 96684, at *7 (C.D. Cal. May 30, 2023) (“Defendants cannot wrest legal prejudice from dismissal simply by announcing their intention to file a motion for summary judgment.”). Accordingly, the dismissal here should be granted with no terms or conditions attached.

IV. PLAINTIFF SEEKS VOLUNTARY DISMISSAL TO STOP DEFENDANT’S HARASSMENT

Plaintiff wishes to voluntarily dismiss this action without prejudice as a result of Defendant’s persistent and escalating harassment and intimidation based on meritless speculation that Plaintiff was purportedly recruited to bring this case against Defendant by Plaintiff’s counsel “as a result of an illegal capper arrangement.” (White Decl. ¶ 6).

Defendant’s baseless accusations are predicated entirely on an unrelated case that Plaintiff filed in a different court against a different defendant, *White v. The Kroger Co., et al.*, No. 3:21-cv-08004-RS (N.D. Cal.) (“*Kroger*”), that has been dismissed. (See Dkt. 40 at 5:19–6:9). On October 12, 2021, Plaintiff filed *Kroger*. (White Decl. ¶ 2). Kroger in turn unjustifiably hired private investigators to surveil and intrude upon the privacy of third parties. (*Id.*) These investigators were dispatched to personally serve or attempt to serve deposition and document subpoenas at the homes and workplaces of individuals Daniel O’Brien and Christopher O’Brien, as well as other family members of the O’Briens and additional friends of Plaintiff. (*Id.*) Ultimately, Plaintiff was forced to file a motion to dismiss his case to stop defense counsel’s harassment. (*Id.*) The court later granted Plaintiff’s motion, making no finding of an illegal arrangement that Defendant accuses Plaintiff and his counsel of engaging in, or wrongdoing of any kind. See *White v. Kroger Co.*, No. 21-cv-08004-RS, 2023 U.S. Dist. LEXIS 110812 (N.D. Cal. June 27, 2023). Still, Defendant here elected to mislead the Court by suggesting falsely that its speculative claims were somehow substantiated in *Kroger*. (Dkt. 40 at 5:22-26).

1 In a calculated effort to exact the very same intimidation and harassment in
2 *Kroger*, Defendant deployed private investigators to personally serve Daniel O’Brien
3 and Christopher O’Brien, as well as stake out and follow Daniel O’Brien’s wife,
4 Lauren E. Anderson. (Declaration of Lauren E. Anderson, “Anderson Decl.” ¶ 5). On
5 September 15, 2023, Defendant’s private investigator went to Daniel O’Brien’s home
6 in the middle of the workday and aggressively knocked on the front door in a
7 disruptive manner that interrupted an important work meeting in which he was
8 presenting. (*Id.*) That same day, Defendant’s private investigator went to Clarkson
9 Law Firm’s (CLF) office to photograph CLF employees’ personal vehicles, which
10 were parked in a restricted, gated lot, including Ms. Anderson’s vehicle. (*Id.*) Ms.
11 Anderson, who was working in the office at the time, saw the investigator gaining a
12 vantage point and taking photos of the vehicles over the wall; when he realized he
13 had been spotted, he hastily departed the premises. (*Id.*) After Ms. Anderson left
14 CLF’s office, Defendant’s investigator followed her recklessly and closely on her
15 commute home in a manner that made her feel unsafe. (*Id.*) The combination of being
16 stalked at her workplace and then tailgated on her way home reasonably caused Ms.
17 Anderson distress. (*Id.*) Upon arriving home, the investigator was waiting in his car,
18 parked outside Ms. Anderson’s house. (*Id.*) Ms. Anderson approached the
19 investigator and inquired why he was following her. (*Id.*) He identified himself as a
20 “former FBI agent” and that he was there to serve Ms. Anderson’s husband with a
21 subpoena. (*Id.*) Ms. Anderson went into her house, retrieved her husband, and brought
22 him outside to the investigator who then personally served Daniel O’Brien with a
23 deposition subpoena in connection with this case. (*Id.*) Also on September 15, 2023,
24 Defendant’s private investigator personally served Daniel’s father Christopher
25 O’Brien at his private residence. (*Id.*)

26 Further, the subpoenas seek wholly irrelevant, privileged, and unduly
27 burdensome documents, including, for example, the O’Briens’ private
28 communications with their wife and daughter-in-law Ms. Anderson; the O’Briens’

1 communications with any employee at CLF (which totals more than 100 different
2 employees); the O'Briens' communications with any client of CLF (which totals
3 several thousand individuals); any communication the O'Briens received or posted
4 on public websites at any time related to Defendant; and the list of all attendees at Ms.
5 Anderson and Daniel O'Brien's wedding ceremony and reception. Defendant insists
6 that the O'Briens' testimonies and documents are relevant to determine whether
7 Plaintiff is participating in this action as a result of an illegal capper arrangement,
8 however, Defendant has failed to provide any evidentiary basis supporting its
9 allegations and would not be able to because no such arrangement exists. (Dkt. 40 at
10 12:10-11; White Decl. ¶¶ 4-8; Declaration of Ryan J. Clarkson, "Clarkson Decl." ¶¶
11 3-5; Sodaify Decl. ¶¶ 5-7; Anderson Decl. ¶¶ 3-5). Instead, Defendant relies solely on
12 the unsubstantiated accusations made by other counsel in another case without any
13 evidence.

14 Yet Defendant has taken zero steps to obtain the information it seeks in good
15 faith. It has not attempted to depose Plaintiff to obtain any testimony from him
16 whatsoever, and it has not even noticed Plaintiff's deposition. (Sodaify Decl. ¶ 2); *see*
17 *also Callwave Commc'ns, LLC v. Wavemarket, Inc.*, No. C 14-80112 JSW (LB), 2014
18 WL 2918218, at *4 (N.D. Cal. June 26, 2014) ("[C]ourts generally hold that where
19 an opposing party and a non-party both possess documents, the documents should be
20 sought from the party to the case."); *Soto v. Castlerock Farming and Transport, Inc.*,
21 282 F.R.D. 492, 505 (E.D. Cal. 2012) ("Where plaintiffs have not shown they
22 attempted to obtain documents from the defendant in an action prior to seeking the
23 documents from a non-party, a subpoena duces tecum places an undue burden on a
24 non-party."); *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 577 (N.D. Cal.
25 2007) (quashing a non-party subpoena duces tecum where the discovery sought was
26 "obtainable from a source more direct, convenient, and less burdensome [than the
27 non-party]—namely, from Defendants.").

28 //

1 Instead, Defendant is simply imitating the harassing tactics and strategies
2 employed by the defense counsel in *Kroger*, regurgitating false accusations against
3 Plaintiff, his counsel, and their friends and families. Just as these same intimidation
4 tactics were designed to evoke psychological intimidation in *Kroger*, here Defendant
5 is aiming to persecute Plaintiff to the point he abandons his pursuit to hold Defendant
6 accountable for its deceptive and misleading practices.

7 Specifically, Defendant has targeted individuals unrelated to this lawsuit
8 merely because of their tenuous relation to Plaintiff. Neither Daniel O'Brien nor
9 Christopher O'Brien has ever discussed this case with Plaintiff prior to being served
10 with subpoenas; they have never previously discussed Plaintiff's purchase of the
11 Product; they have never and will never receive any sort of consideration in
12 connection with this case; and they have never given or promised Plaintiff any sort of
13 consideration in connection with this case. (White Decl. ¶¶ 4, 7). Further, Defendant
14 has not based its abusive behavior off any actual evidence that Plaintiff and his
15 counsel of record have any sort of friendship, familial relationship, or financial
16 relationship outside of their attorney-client relationship. Nor can it. As confirmed
17 under oath, Ryan Clarkson and Bahar Sodaify do not have a familial, social, or
18 financial relationship with Plaintiff aside from their attorney-client relationship
19 embodied in their retainer agreement. (Clarkson Decl. ¶ 5; Sodaify Decl. ¶ 7; White
20 Decl. ¶ 5).

21 Courts have recognized that a pre-existing social relationship *coupled with a*
22 financial relationship, or a familial relationship, may pose a conflict of interest in the
23 class action setting. *Drimmer v. WD-40 Co.*, 343 Fed. App'x 219, 221 (9th Cir. 2009)
24 (affirming disqualification of plaintiff due to "the combination of a personal
25 relationship [and] landlord-tenant relationship" between plaintiff and class counsel,
26 in addition to the plaintiff's "inexplicable disinterest in pursuing all remedies available
27 to him"). However, people naturally reach out to lawyers they know when seeking
28 legal representation. That is why courts in this circuit recognize that a friendship alone

1 is no reason to presume a conflict of interest or improper solicitation, or to otherwise
2 disqualify a class representative or their counsel. For example, in *Kesler v. Ikea U.S.,*
3 *Inc.*, the court found plaintiff adequate even though she had known class counsel since
4 fourth grade, attended high school with her, saw her on a regular basis, and was a
5 bridesmaid in her wedding. 2008 WL 413268, at *5-6 (C.D. Cal. Feb. 4, 2008).
6 Likewise, in *DeNicolo v. Hertz Corp.*, the court found that plaintiff was adequate,
7 notwithstanding the fact he and his attorney are neighbors and “close friend[s],” their
8 kids go to school together, they do block parties and dinners together, they borrow
9 tools from one another, they have been in each other’s homes, and they go out to
10 dinner and drinks together. 2021 WL 1176534, at *5-6 (N.D. Cal. Mar. 29, 2021).
11 The court explained that as it “and others have previously found, in the absence of
12 some evidence to indicate that a friendship between the class representative and one
13 of his attorneys would create a conflict of interest, the court will not presume one.”
14 *Id.* Other courts are in accord. *See, e.g., Ries v. Arizona Beverages USA LLC*, 287
15 F.R.D. 523, 540 (N.D. Cal. 2012) (rejecting “defendants attempt to insinuate that the
16 supposed friendship between plaintiffs’ counsel and the named plaintiffs creates a
17 conflict with respect to absent class members.”); *Melgar v. Zicam LLC*, No. 2:14-cv-
18 00160-MCE-AC, 2016 WL 1267870, at *4 (N.D. Cal. Mar. 31, 2016) (“[A]s to the
19 ‘close relationship’ between Plaintiff and one of the attorneys representing her, such
20 a relationship could arguably enhance the quality of the representation that class
21 counsel provides (and best further the interest of the class); *Clevenger v. Welch Foods*
22 *Inc.*, 342 F.R.D. 446, 457 (C.D. Cal. 2022) (finding a “close personal relationships
23 with class counsel does not render Plaintiffs inadequate class representatives”).

24 Indeed, Plaintiff’s counsel has been unable to find a single case in which a court
25 found a friendship between a class representative and an employee at the same firm
26 as class counsel, alone, creates any sort of conflict of interest—much less a basis for
27 Defendant to charge publicly the friendship is an “illegal capper arrangement,” with
28 zero evidence at the outset of discovery. (Sodaify Decl. ¶¶ 3, 6; Dkt. 40 at 5, 10-12).

1 In the end, Defendant has successfully intimidated Plaintiff into dismissing this
2 action through its deliberate use of subpoenas to harass Plaintiff, his friends, his
3 counsel, and his counsel's family members, and by leveraging the public nature of
4 legal proceedings to defame him publicly in an initial case management statement
5 with speculative and unfounded charges. (White Decl. ¶¶ 4, 6, 8). Defendant's
6 behavior is unacceptable. The aforementioned events leave Plaintiff feeling
7 understandably uncomfortable, and wanting to voluntarily dismissing this action as a
8 result of Defendant's abhorrent behavior. (*Id.* ¶ 6). As such, Plaintiff reluctantly
9 believes the only course of action that will save him and any other individuals
10 Defendant may later choose to harass is to dismiss this action without prejudice. (*Id.*
11 ¶¶ 6, 8).

12 Finally, dismissal will not prejudice any putative class members because: (1)
13 no class was certified; (2) no notice of this action was sent to any putative class
14 members; (3) Plaintiff's counsel is not aware of any putative class members who are
15 relying on the pendency of this case; and (4) the statute of limitations for any claims
16 by putative class members has been tolled during the pendency of this action, so that
17 when dismissal is entered, the putative class members will be in the same position
18 they were the day before the instant action was filed. (Sodaify Decl. ¶ 4); *see also Am.*
19 *Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553-54 (1988) (class action tolled the
20 applicable statute of limitations for the individual members of the class). Where, as
21 here, the parties do not seek dismissal of the class members' claims with prejudice,
22 "they are not impacting the rights of potential class members." *Houston v. Cintas*
23 *Corp.*, No. C 05-3145 JSW, 2009 WL 921627, at *2 (N.D. Cal. Apr. 3, 2009).

24 //

25 //

26 //

27 //

28 //

1 **V. CONCLUSION**

2 Based on the foregoing, the Court should grant Plaintiff's motion to dismiss
3 this case without prejudice.

4 DATED: September 28, 2023

Respectfully submitted,

5 **CLARKSON LAW FIRM, P.C.**

6
7 By: /s/ Bahar Sodaify
8 Ryan J. Clarkson, Esq.
9 Bahar Sodaify, Esq.
10 Alan Gudino, Esq.
11 Ryan D. Ardi, Esq.

Attorneys for Plaintiff